Supreme Court, U.S.
FILED
FEB 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1015

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES F. MONAHAN, et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the First Circuit

BRIEF FOR AMICI CURIAE

Alabama, Arizona, Delaware, Hawaii, Idaho, Illinois, Kansas, Louisiana, Michigan, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee, West Virginia, Commonwealth of the Northern Mariana Islands

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INTEREST OF AMICI CURIAE

The states listed above submit this brief amici curiae in support of the

petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. The interests of the amici relevant to the case are legal, institutional, and financial.

The states have an important legal interest in the clarification of the scope of state immunity from the antitrust laws. The decision of the court of appeals improperly narrows the immunity intended by Congress. Plenary review in this case will clarify the authority of state regulatory agencies to exercise traditional police powers free from antitrust investigation and litigation.

The petition also implicates the states' interests in effective economic regulation. The stated purpose of the FTC's investigation of the states is to determine whether state agencies are en-

gaging in "unfair methods of competition by promulgating and enforcing regulations to restrict competition." Pet. App. A44-45, A63-64. The FTC's attempt to review the justifications for and reasonableness of the states' regulatory programs, and in so doing to probe the involvement and intent of state officials in developing, promulgating and enforcing regulations, directly burdens state economic regulation. As governments exercising traditional regulatory powers to protect the public health and safety, the states are uniquely qualified to testify to the importance of the question presented by the petition in this case.

Finally, the states have an important financial interest in the question presented by the petition. The legal defense of FTC investigations and litiga-

tion against the states is an expensive and time-consuming effort. Since the states have borne and will bear the fiscal burdens of the FTC's enforcement actions, they are well qualified to convey the national importance of this case to the Court.

REASONS FOR GRANTING THE WRIT

The amici support the petitioners in their statement of the reasons for granting review of this case. To those reasons amici add a brief statement of the following two points: (1) the national scope of the FTC effort, and (2) the degree of intrusion into state affairs worked by FTC enforcement of the antitrust laws against the states.

1. Each of the amici states have regulatory agencies identical or sub-

stantially similar to the Massachusetts State Pharmacy Board. In each state, agencies exercise powers of economic regulation delegated by their state legislature to protect the public health and safety. In each state, while the legislature provides guidance in the relevant statutory grant of authority, the legislature has delegated broad powers to the agencies to promulgate substantive rules governing business and professional conduct. Thus the regulatory action of Massachusetts challenged by the FTC in this case is similar to a substantial number of regulatory programs in the amici states.

The FTC investigation challenged in this case is likewise national in scope. As the petition demonstrates, a substantial number of states have already come under FTC scrutiny. Pet. 20-22 n. 9.

For example, FTC has subpoenaed current and former members and staff of the Michigan and Colorado Boards of Pharmacy to testify in connection with the FTC's investigations of regulations of those Boards. The Colorado Attorney General unsuccessfully sought to have the FTC quash subpoenas issued to the Colorado Board of Pharmacy, and that Board later revised certain of its regulations governing pharmacy in that state. The investigation of the Michigan Board is pending.

In some cases the Commission has issued complaints and entered consent orders. See, e.g., In re Rhode Island Board of Accountancy, FTC Docket No. 9181, 50 Fed. Reg. 49064 (November 29, 1985); In re Wyoming State Board of Registration of Chiropractors, FTC File No. 861-0019, FTC Docket No. C-3176, 51 Fed.

Reg. 6106 (February 20, 1986); In re Montana Board of Optometrists, FTC Docket No. C-3161, 50 Fed. Reg. 24203 (June 10, 1985); In re Louisiana State Board of Dentistry, FTC Docket No. 9188.

An investigation by the FTC entails significant costs even at the initial, informal stage. The licensing agencies of the amici states have small budgets and few or no staff to spare for the burdensome discovery demanded by the FTC. If the FTC determines to begin formal proceedings, as the petition shows, the burdens and cost of defending are multiplied. Pet. App. A90 (Barnico Affidavit). Because of these burdens, in many cases, the threat of FTC litigation has prompted state agencies to change state regulations despite their conviction that the regulations promoted sound regulatory policies.

For example, the FTC has commenced investigations of the regulations of several Oregon agencies. Because those agencies must pay the cost of representation out of their budgets, at least one agency has chosen to repeal questioned regulations rather than commit a substantial portion of its annual budget (as well as the time of its staff) to legal defense. Likewise, in Oklahoma the threat of an FTC investigation, and the implicit threat of personal liability, has caused several agencies to abandon regulations rather than incur the risk and burdens of defending them. Similar examples abound throughout the amici states.

2. In addition to its national impact, the petition also presents a question of national importance. As the petition demonstrates, the "effect of

the decision below is to trammel state regulatory authority without clear congressional warrant." Pet. 59.

The FTC's effort fundamentally misconceives the prerogatives of state agencies under the antitrust laws. The FTC would substitute its own regulatory judgment for that of state regulators who traditionally exercise police powers to protect the public health and safety. The FTC's position also obviates the internal corrective processes of the States. In many of the amici states, the Attorney General or another state agency has advocated changes in regulations which they believe to be unduly restrictive of competition. Furthermore, in each of the amici states, persons affected by business regulations are free to test the lawfulness of the regulations

under state law. The FTC's position undermines these processes by using the antitrust laws to challenge collaterally not only the lawfulness, but also the reasonableness of state regulatory measures.

The wisdom of particular regulations is not the issue presented by the petition. The petition argues that the antitrust laws were never intended to mediate the inevitable disagreements between federal and state governments as to the reasonableness of particular economic regulation. Rather, in enacting the antitrust laws, Congress chose to leave the states free to enact their own regulatory programs, even though they might appear to conflict with the policies embodied in the antitrust laws. Because the FTC would reverse this choice, and

would substitute its own policy for the diverse policies of the states, the petition is worthy of review by the Court.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari, and should review and reverse the judgment of the court of appeals.

Respectfully submitted,

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